

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VANTHONY WYATT,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 237309

Genesee Circuit Court

LC No. 00-006203-FC

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions, as an aider and abettor, of first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit armed robbery, MCL 750.89, and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to life imprisonment for the first-degree murder conviction, eighteen years and nine months to forty years' imprisonment for the assault with intent to commit armed robbery conviction, and ninety-five months to twenty years' imprisonment for the first-degree home invasion conviction. We affirm.

Defendant first argues that the trial court erred when it concluded that the prosecution demonstrated due diligence in its attempts to locate Michael Kilgore. We disagree. This Court reviews a trial court's determination that due diligence was established for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The trial court's factual findings that underlie its due diligence decision will not be set aside unless clearly erroneous. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

A witness is considered "unavailable" when he is absent from the hearing, and the proponent of the testimony has not been able to procure the witness' attendance by reasonable means and, in a criminal case, due diligence is shown. MRE 804(a)(5); *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998); *Bean, supra*, 457 Mich 684. "The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *Bean, supra*, 457 Mich 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.*

Here, the record establishes that the prosecution made a sustained effort to locate Kilgore. The police attempted to serve subpoenas on Kilgore on or around June 2, 2001. Additionally, the police made repeated visits to Kilgore's last known address. The prosecution utilized the resources of the fugitive team, the local police, and the LEADS program. Further, the prosecution also checked with local jails, hospitals, the Secretary of State, and the United States Postal Service. A review of the testimony at the due diligence hearing establishes that the police, at a minimum, made efforts to find Kilgore on June 2, 2001, June 12, 2001, July 24, 2001, July 26, 2001, August 6, 2001, and August 7, 2001. Further, Kilgore communicated via his family that (1) he was aware of defendant's trial, and (2) he did not wish to appear in court because of the repercussions he faced for violating probation. Nonetheless, despite these efforts by the prosecution, defendant argues that the prosecution's efforts were insufficient because it failed to review previous police reports, canvas Kilgore's neighborhood or check with all relatives that may have lived in Michigan; however, we conclude that the law in this state does not require that the prosecution perform an exhaustive search.

Defendant also argues that the prosecution waited until days before defendant's trial was originally scheduled to begin, and thus, the prosecution's efforts should be categorized as tardy. We note that defendant's argument would have merit if defendant's trial had actually occurred on June 7, 2001, because the prosecution admittedly began its attempts to locate Kilgore on or around June 2, 2001. However, defendant's trial began on August 2, 2001; and thus, the prosecution attempted to locate Kilgore two months before defendant's actual trial date.

Kilgore made an informed decision to knowingly evade the police and the prosecutor. After a careful review of the record, we find that reasonable, diligent, good-faith efforts were made to procure Kilgore's presence. The trial court's finding, that Kilgore absconded¹ from the supervision of the trial court before the prosecution made efforts to secure Kilgore's presence for trial, was not clearly erroneous, and the trial court did not abuse its discretion when it determined that the prosecution demonstrated due diligence. *Bean, supra*, 457 Mich 684; *Lawton, supra*, 196 Mich App 348.

Defendant argues next that the trial court erred in admitting Kilgore's preliminary examination testimony because (1) it lacked sufficient indicia of reliability, and (2) defendant's original defense counsel failed to conduct a meaningful cross-examination. Again we disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, this Court reviews de novo whether the admission of the evidence was sufficiently reliable to protect defendant's constitutional right of confrontation. *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000).

Where a declarant is unavailable as a witness, the hearsay rule does not exclude "testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect." MRE 804(b)(1); see also *People v Adams*,

¹ Kilgore was subject to receiving a prison sentence for probation violations and two bench warrants were issued for his arrest.

233 Mich App 652, 656; 592 NW2d 794 (1999). Even when evidence of an unavailable witness is admissible under the Michigan Rules of Evidence, it is still necessary to determine whether the use of the testimony would violate a defendant's constitutional right to confront prosecutorial witnesses. US Const, Am VI; Const 1963, art 1, § 20; *Adams, supra*, 233 Mich App 659.

The Confrontation Clause allows the preliminary examination testimony of an unavailable witness to be used at trial under MRE 804(b)(1) only upon a showing that the testimony bears satisfactory indicia of reliability. *Meredith, supra*, 459 Mich 68. This "reliability requirement is satisfied 'without more' if the proposed testimony falls within a firmly rooted exception to the hearsay rule." *Id.* at 69; *Adams, supra*, 233 Mich App 659-660.

Although defendant argues that Kilgore's preliminary examination testimony lacked meaningful cross-examination, MRE 804(b)(1) only requires that there was an opportunity for cross-examination under a similar motive. After our review of the record, we conclude that defendant had the opportunity to cross-examine Kilgore and defendant had a similar motive when cross-examining Kilgore at the preliminary examination, as he would have at trial. We note that defendant went over step-by-step each statement that Kilgore made during his direct testimony. Indeed, contrary to defendant's argument regarding defense counsel's failure to question Kilgore about his inconsistent statements, defense counsel, on cross-examination, asked Kilgore about the week delay in informing the police about "what actually happened." Defendant's cross-examination was designed to attack Kilgore's credibility by finding inconsistencies in his testimony with the goal of discrediting him as a witness. As such, the trial court properly admitted Kilgore's preliminary examination testimony. MRE 804(b)(1); *Adams, supra*, 233 Mich App 656. Because MRE 804(b)(1) is a hearsay exception firmly rooted in American jurisprudence, the Confrontation Clause was satisfied when the testimony was admitted under that exception. *Id.* at 659-660.

In light of our previous conclusion that the trial court properly admitted Kilgore's preliminary examination testimony, we need not address defendant's final claim of error that the evidence was insufficient to sustain defendant's convictions absent Kilgore's preliminary examination testimony.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy